DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 7968-99
26 April 2000

MR [redacted]
[redacted]

Dear [redacted]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 26 April 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by Headquarters Marine Corps dated 29 February and 15 March 2000, copies of which are attached. They also considered your rebuttal letter dated 5 April 2000.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinions. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

7968-99

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

7968-99

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:
1070
JAM2
29 FEB 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF CHIEF WARRANT OFFICER 2 [redacted] U.S. MARINE CORPS RESERVE

1. We are asked to provide an opinion on Petitioner's request to expunge all entries in his Official Military Personnel File (OMPF) related to his having been sent on involuntary appellate leave. Petitioner also requests reinstatement in the United States Marine Corps Reserve and the voiding of his honorable discharge.

2. We recommend that the requested relief be denied. Our analysis follows.

3. Background

a. On 24 January 1992, Petitioner was found guilty at a general court-martial (GCM) of attempting to illegally bring firearms into the United States, conspiracy, and failing to report and turn over captured or abandoned enemy property, in violation of Articles 80, 81, and 103, Uniform Code of Military Justice (UCMJ). Petitioner was awarded a dismissal from the Marine Corps Reserve. On 29 January 1993, the convening authority approved the sentence, and then ordered Petitioner on involuntary appellate leave.

b. On 17 February 1995, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) remanded the case to the trial level for a limited hearing to determine whether Petitioner held the rank of warrant officer (WO) or chief warrant officer 2 (CWO2) at the time of trial. On 7 June 1995, it was determined that although Petitioner was promoted to CWO2 immediately after trial, he was a WO at the time of trial. The case was then returned to NMCCA for additional appellate review. On 23 February 1996, NMCCA approved the findings but concluded that, since Petitioner was not a commissioned officer at the time of trial, he could not properly have been sentenced to a dismissal. The court then "converted" the dismissal to a dishonorable discharge.

c. On 12 March 1997, the U.S. Court of Appeals for the Armed Forces (CAAF) granted review on the issue[1] of whether NMCCA could properly convert a dismissal into a dishonorable discharge. On 1 June 1997, however, Petitioner was involuntarily discharged from the Marine Corps Reserve because he had twice failed of selection to CWO3 while on appellate leave. Petitioner received an honorable discharge. On 27 May 1998, CAAF decided that Petitioner's discharge had rendered the granted issue moot, set aside the dishonorable discharge, and affirmed a sentence of no punishment. CAAF did not disturb the guilty findings.

4. Analysis

a. Petitioner contends that CAAF's decision requires expunction from his OMPF of not only all entries related to his appellate leave status, but also of entries recording his twice being non-selected for promotion. Petitioner argues that since the punitive discharge was the predicate for his involuntary appellate leave, CAAF's setting aside the discharge rendered that appellate leave void ab initio. Because Petitioner also assumes that he was twice passed due to his appellate leave status, he maintains that entries recording the non-selections should also be purged from his record.

b. Petitioner's argument is without merit. Petitioner was properly sent on appellate leave in accordance with applicable law and regulation. Although the punitive separation that authorized his appellate leave was set aside on appeal, that relief was not based on any judicial determination that the sentence was improper. The sentence was set aside only because Petitioner's intervening honorable discharge -- in context, a significant windfall -- mooted the issue of the sentence's technical propriety,[2] and the issue of whether NMCCA could

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[1] In his submission to this Board, Petitioner refers to language from the granted issue that argues that NMCCA impermissibly increased the severity of his sentence as a result of impermissible speculation. (Pet. at 5.) It should be noted that this assignment of error was drafted by Petitioner's appellate defense counsel, not by CAAF, and that the Court's grant of review on the issue alone in no way constituted an endorsement of the advocacy contained in that assignment of error. Mere grants of discretionary review have no precedential value.

[2] As was correctly noted by NMCCA, the difference between a dismissal and a dishonorable discharge "'is one of terminology, not of substance.'" United [redacted] 43 M.J. 856, 861 (N.M.Ct.Crim.App. 1996)(quoting United

properly convert Petitioner's dismissal to a dishonorable discharge was not reached. Even had that technical issue been resolved in his favor, however, the substantive issue regarding the appropriate sentence on Petitioner's affirmed convictions would have remained. Accordingly, CAAF would simply have remanded the case to NMCCA for that court to either reassess the sentence or, in the alternative, to authorize a rehearing on sentence. In sum, even had CAAF found a technical error effecting sentence, it is fanciful to suggest that the court would have precluded the Government from correcting that error to ensure a properly adjudged sentence on the affirmed findings of guilty.

c. Petitioner also argues that entries regarding his failures of selection while on appellate leave should also be removed from his OMPF. This makes sense only if one assumes that Petitioner failed selection not because he was convicted at a GCM, but because he was on appellate leave. This argument persuades only if one believes an officer promotion selection board would select a Marine for promotion to any rank, let alone CWO3, notwithstanding a GCM conviction. The argument is without merit, as is Petitioner's related argument attacking his separation for non-selection.

d. As a result of an apparent administrative error, see United States [redacted] 50 M.J. 50, 52 (1998)(summary disposition [redacted] dissenting), Petitioner was honorably discharged before the appellate process in his case could be completed with respect to sentence. This provided Petitioner with a pure windfall -- an approved sentence to no punishment, in addition to an honorable discharge.[3] By this application for relief, Petitioner seeks yet again to benefit from a discharge he would not have received but for an oversight that allowed the personnel process to run without reference to the military justice process. Petitioner seeks relief appropriate for a Marine who has been exonerated; as discussed, Petitioner is not such a Marine.

States v. Bell, 24 C.M.R. 3, 4 (C.M.A. 1957)), rev'd as to sentence, 50 M.J. 50 (1998)(summary disposition).

[3] We note from documents provided by Petitioner that he was also paid in excess of $120,000 by the Defense Finance and Accounting Service following the CAAF decision. This in no way serves as authority supporting Petitioner's claim for restoration. Indeed, even if correctly made, in our view this payment was, like the mooting of Petitioner's appeal, simply an unintended collateral result of Petitioner's erroneous discharge for non-selection to CWO3.

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Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION IN THE CASE OF CHIEF WARRANT OFFICER 2 [redacted] U.S. MARINE CORPS RESERVE

5. Conclusion. Accordingly, for the reasons noted, we recommend that the requested relief be denied.

[redacted]
Head, Military Law Branch
Judge Advocate Division

1968-99

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:

1610
RAM
15 Mar 00

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF CWO2 [redacted]

Ref: (a) MMER Request for Advisory Opinion in the case of CWO2 [redacted] Jan 00

1. Recommend disapproval of [redacted] request for "removal of promotional passes from permanent record" and reinstatement into the Reserve of the United States Marine Corps.

2. We have reviewed CWO2 [redacted] record and offer the following opinion regarding his request for removal of failure(s) of selection. CWO2 [redacted] was promoted to his present rank on 1 Oct 91. As a CWO2, he only received one observed Fitness Report in which he was ranked 2 of 2 in the Outstanding Category prior to a not observed TD report which ended when SNO was ordered home on appellate leave. SNO was subsequently convicted on 24 Jan 92 at a general court-martial (GCM) for violation of Articles 80, 81, and 103 of the UCMJ and awarded a dismissal from the Marine Corps Reserve. It is our opinion that due to his GCM conviction, CWO2 [redacted] record was noncompetitive before the Reserve CWO3 Selection Boards, and that there are no grounds for removal of said failures of selection.

3. Point of contact regarding this matter is Major [redacted] at (7[redacted]

[redacted]
Lieutenant Colonel, U.S. Marine Corps
Head, Career Management Team
Reserve Affairs Manpower Branch
Reserve Affairs Division